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Supreme Court of the United States

No. 451. OCTOBER TERM, 1936.

WILLIAM WHITLOCK BRUSH,
Petitioner-Appellant,
against
COMMISSIONER OF INTERNAL REVENUE.

MOTION FOR LEAVE TO ARGUE ORALLY AND BRIEF AMICUS CURIAE, BY STATE OF NEW YORK.

JOHN J. BENNETT, JR.,
Attorney-General.

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Capitol,
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Supreme Court of the United States

No. 451. October Term, 1936.

WILLIAM WHITLOCK BRUSH,
Petitioner-Appellant,
against
COMMISSIONER OF INTERNAL REVENUE.

Motion for Leave to Argue Orally and Brief Amicus Curiae.

To the Honorable the Supreme Court of the United States:

1. The undersigned, on behalf of the State of New York, pray for leave to argue orally for a period of about fifteen minutes, in behalf of position of appellant in the above cause, and to file the subjoined brief in support thereof.

2. The problem presented in the cause at issue is of vital concern to the State of New York, its political subdivisions and municipal corporations. There are in the State of New York, statutory public municipal corporations and special districts of varied character, governmental agencies all, performing what have been regarded heretofore as normal and vital governmental functions, whose employees, officers, obligations and even the property of which may be subject to federal taxation, if the decision of the Circuit Court of Appeals herein be sustained.

3. The Government of the State of New York as a state is subdivided into nineteen constitutionally created "departments," including a Department of Public Works, which operates the canals and waterways of the State, as well as the highways, bridges, etc., whether toll or free, except those expressly vested in special bodies; a Department of Conservation, directing and operating park facilities, parkways, reforestation, fish hatcheries, etc.; a Department of Mental Hygiene, operating hospitals, sanitaria and asylums; a Department of Health, operating hospitals, sanitaria for tubercular patients, etc. Many of these are productive of some revenues, even though the functions are regarded as governmental.

4. The political subdivisions of the State of New York comprise:

62 counties,
60 cities,
932 towns,
554 villages

---

a total of 1608 political units of government, each operating many functions which are of the character involved in the instant appeal. With few exceptions the larger units of these operate their water supply, street cleaning, sewage disposal, fire protection, street improvement, police protection, public hospitalization and like functions.

5. For performance of such functions of government among the smaller units in the State, statutes*

* County Law—Ch. 11 of Consolidated Laws of N. Y. (Ch. 16 L. 1909). Town Law—Ch. 62 Consolidated Laws of N. Y. (Ch. 634 L. 1932) and numerous special statutes.

have provided for the creation of separate corporate municipalities with various names, whose obligations and employees have always been regarded as free from federal taxation. Among such public bodies corporate are:

236	Water	Districts
33	Water Supply	"
148	Sewer	"
3	Public Dock	"
44	Garbage	"
557	Fire	"
7	Fire Alarm	"
100	Fire Protection	"
205	Pavement	"
836	Lighting	" (Illumination, not Power)
21	Sidewalk	Districts.
1	Traffic	"
1	Park	"
3	Health	"
4	Curb	" (Sidewalks)
1	Oiling	" (Highways)
1	Police	"
1	Hospital	"

a total of 2202 municipal corporations for special functions.

Almost all of these have obligations of a public corporate character; employees in civil service tenure; performing functions more expeditously executed in this manner and otherwise probably unavailable to these smaller units. The supply of potable water and

water for fire protection and public use is the almost sole purpose of the water and water supply districts, of which there are 269 districts aside from the town and city departments which operate as parts of their respective governmental units.

6. For broader functions of larger areas, or statewide in scope, there have been created public legislative corporations, known as "authorities," "commissions," and "districts," which have their own officers and employees, borrow on their own credit, derive revenues from their operations in the nature of self-liquidation of cost of construction,—all of which are however performing functions, normal and traditional to government in the states. These enable the State the better to organize and manage its finances, budgetary problems, taxation and administration, without unduly concentrating power in the State departments. Among such are:

7 Bridge Authorities
2 Port "
5 Parkway and Highway Authorities
4 Drainage and River Regulating Districts
1 Industrial Exhibit Authority
3 Regional Market Authorities
1 Sewer Authority
2 Miscellaneous Districts

a total of 25 special, State created corporate agencies of the State for public governmental purposes.

7. There are also numerous school districts, distinct from city boards of education, which perform the sole function of public education, many making charges,

where possible, to pay for part of the expense. They, too, have the power to incur obligations, borrow, etc.

8. There is appended hereto as Exhibit "A," a summary of the outstanding bonded indebtedness of these various municipal and State public bodies, together with the amount of the State's own treasury funds invested therein, prepared by the Comptroller of the State of New York. It will be observed that these units have borrowed over $587,000,000 and that the State of New York itself has invested more than $72,500,000 of its own funds in such securities. In addition to these treasury investments, the State Insurance Fund, Vocational Rehabilitation Fund, Teachers' Retirement Fund, Aggregate Trust Fund, Special Disability Fund have invested $3,051,715 in securities of water departments, water districts, water works, including those of New York City.

9. The basis of the determination of the Circuit Court of Appeals, and of the Government in this case is that the function of water supply in New York City is proprietary; that it might have been and still be provided by private capital and therefore may be subjected to federal taxation. For that reason the petitioner Brush, a civil service employee of the City of New York for over twenty-three years, is asked to pay a federal income tax on his salary from the City of New York. Subjected to that test, any and all of the functions of the numerous public and municipal corporations enumerated above would be so subject to federal taxation, and we doubt not that the Bureau of Internal Revenue will so contend. The effect of such an invasion of federal taxing power into the realm of State government

will be seriously to jeopardize the hundreds of millions of dollars in outstanding obligations, heretofore regarded as exempt, and will seriously affect the investments of the treasury of the State of New York itself. We cannot overestimate the gravity of the problem presented by this appeal.

WHEREFORE, the undersigned on behalf of the State of New York, contending that the salary of petitioner Brush should not be held subject to taxation by the Federal Government under the federal income tax law, asks leave to be heard orally on the argument of the above cause, and submits for the consideration of this Honorable Court the subjoined brief in support thereof.

Yours, etc.,

JOHN J. BENNETT, JR.,
Attorney-General,
State of New York.
By
HENRY EPSTEIN,
Solicitor General, Counsel.

Dated:

Exhibit "A".

	Amount Outstanding	*Amount held by State Comptroller*
Authorities and Commissions		
Port of New York Authority	$192,147,000.00	$12,094,000.00
New York State Bridge Authority	2,141,000.00	2,141,000.00
Buffalo and Fort Erie Public Bridge Authority	4,000,000.00	300,000.00
Bethpage Park Authority	990,000.00	90,000.00
Lake Champlain Bridge Commission	1,500,000.00	.....
Niagara Frontier Bridge Commission	2,547,000.00	.....
Saratoga Springs Authority	3,150,000.00	.....
Jones Beach State Parkway Authority	5,050,000.00	.....
Whiteface Mountain Highway Commission	1,050,000.00	1,050,000.00
Lenox-Sullivant Drainage Improvement District	73,600.00	.....
Walkill Valley Drainage Improvement District	180,000.00	180,000.00
Industrial Exhibit Authority	330,000.00	330,000.00
Lower Hudson Regional Market Authority	160,000.00	.....
Central New York Regional Market Authority	270,000.00	.....
New York State World War Memorial Authority	None	.....
Rockland-Westchester Hudson River Crossing Authority	None	.....
Henry Hudson Parkway Authority	3,100,000.00	.....

	Amount Outstanding	*Amount held by State Comptroller*
Thousand Islands Bridge Authority	None	.....
Pelham Portchester Parkway Authority	None	.....
American Museum of Natural History—		
Planetarium Authority	650,000.00	.....
Triborough Bridge Authority	30,000,000.00	.....
Marine Parkway Authority	6,000,000.00	.....
Buffalo Sewer Authority	8,250,000.00	1,000,000.00
Hudson River Regulating District	9,150,000.00	1,622,000.00
Black River Regulating District	919,000.00	897,000.00
	271,657,600.00	19,704,000.00
Totals carried forward	$271,657,600.00	$19,704,000.00
Special Districts		
Towns		
Dock	4,050.00)	
Paving	9,818,407.75)	
Sanitary	310,000.00)	2,003,000.00
Sidewalk	243,057.14)	

	Amount Outstanding	*Amount held by State Comptroller*
Miscellaneous	1,271,740.00)	
Drainage	295,084.92)	
Fire	693,865.00)	9,989,195.79
Sewer	22,019,737.23)	
Water	15,398,982.50)	
School	88,402,434.00	38,530,810.46
Villages		
School	63,430,837.00	87,788.00
Cities		
School (except New York City)	114,445,759.00	2,216,150.00
Grand Totals	$587,991,554.54	$72,530,944.25

Dept. of Audit and Control
December 14, 1936

SUPREME COURT OF THE UNITED STATES.

No. 451. October Term, 1936.

WILLIAM WHITLOCK BRUSH,
Petitioner-Appellant,
against
COMMISSIONER OF INTERNAL REVENUE.

BRIEF AMICUS CURIAE OF STATE OF NEW YORK.

I.

The Department of Water Supply, Gas and Electricity of the City of New York represents and performs a normal and necessary governmental function, meeting the standards laid down by this Honorable Court.

Ashton et al. v. Cameron County Water Improvement Dist. No. 1, 56 Sup. Ct. Rep. 892, Dec. May 25, 1936.
Helvering v. Powers, 293 U. S. 214.
Indian Motorcycle Co. v. U. S., 283 U. S. 570.
Trenton v. New Jersey, 262 U. S. 182.
U. S. v. B. & O. R. R. Co., 17 Wall. 322.

The Legal Principles:

The rule of constitutional immunity was laid down in *McCulloch v. Maryland,* 4 Wheat. 316 and followed

through *Helvering v. Powers,* 293 U. S. 214 to *Ashton et al. v. Cameron Co. Water Improvement Dist. No. 1,* Adv. Sheets June 8, 1936, Vol. 80. It is not the tax nor the resulting interference that governs, but the principle itself of governmental immunity. It is an essentially reciprocal principle.

> "That immunity is implied from the nature of our federal system and the relationship within it of state and national governments, and is equally a restriction on taxation by either of the instrumentalities of the other."
>
> *U. S. v. California,* 80 L. Ed. (Adv. Opinions) 367/374.

The so-called doctrine of "essential governmental functions", derived from the case of *Flint v. Stone Tracy Co.,* 220 U. S. 107 at 172, and set in rule form by the Bureau of Internal Revenue (R. 9, 10; fols. 25, 28), was rejected by this court in *Helvering v. Powers, supra.* It was an unwarranted extension of a power in a field where inapplicable.

See:

> *Commissioner v. Sherman,* 69 Fed. (2nd) 755, (1934) at pp. 756-7, which case was not appealed by Government counsel.
>
> *Halsey v. Helvering,* 75 F. (2nd) 234 (1934).

Out of the cases of *South Carolina v. U. S.,* 199 U. S. 437; *Ohio v. Helvering,* 292 U. S. 360; *Helvering v. Powers,* 293 U. S. 214, have come the following as rules of law:

1. When a state enters the market place seeking customers and assumes the character of trader or merchant; when it enters into the business

> of buying or selling commodities, *that* business is not immune from federal taxation.
>
> 2. When a state engages in businesses which constitute a departure from *usual* or *traditional* governmental functions, it cannot thereby withdraw sources of revenue from the Federal taxing power to which, by reason of their character, the Federal taxing power would normally extend.

In *Helvering v. Powers, supra,* the Chief Justice spoke of

> "the usual governmental functions that are immune from Federal taxation in order to safeguard the necessary independence of the state;"

and thus stated the principle:

> "the State cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from *usual governmental functions.*" (Italics ours.)

It would seem that *Ashton v. Cameron County Water Improvement Dist. No. 1, supra,* is almost decisive of the governmental character of the water supply to a municipal corporate agency of the State. There the district was organized for furnishing "water for irrigation and domestic uses". It supplies all the water to the municipality of Harlingen, Texas, a community of some 15,000 persons. This Court held:

> "It is plain enough that respondent is a political subdivision of the state, created for the local exercise of her sovereign powers." • • •
>
> "If obligations of states or their political subdivisions may be subjected to the interference here attempted, they are no longer free to manage their own affairs;" • • •
>
> "for a very long time this court has steadfastly adhered to the doctrine that the taxing power of

> Congress does not extend to the states or their political subdivisions.'"*

The Facts:

Petitioner—Chief engineer of the Water Supply Bureau of the Department of Water Supply, Gas and Electricity of New York City; civil service employee at full time; served the city for over twenty years in the department. The department was created by statute as one of the city departments and is directed by a Board appointed by the Mayor of the City (Ch. 724 L. 1905; Charter of City of New York, §468).

Historical Summary of Water Supply of the City of New York:

In the old City of New Amsterdam the establishment of a public well was first proposed in 1658 during the incumbency of Peter Stuyvesant as Director General. At a meeting of the Burgomasters held on July 11, 1658 we find:

> "Thursday, 11th July, 1658—in the City Hall. Present: The Herren Olof Stevenson Cortlandt, Paulus Leendersten van der Grift.
> Burgomasters resolved to communicate with General relative to having a public well made in the Heere Straat." (Broadway)[1]

Subsequent to the capture of Fort Amsterdam by the English in 1664, the records indicate that Governor Nicolls dug a well in the Fort and later a public well was dug at the foot of Bowling Green. The pump

* The minority opinion of Mr. Justice Cardozo does not dispute this principle.

[1] Records of New Amsterdam, Vol. 7, p. 190. The General referred to was Director General Peter Stuyvesant.

installed in that well is the first recorded in the City's history.[2]

In 1677, under the English, the Common Council began the systematic construction of wells in the public streets. On February 28, 1676, we find the following in the minutes of the Common Council of the City:

> "Itt is further Ordered that the Severall Weells bee made in the places hereafter menconed (for the publique good of the Cytie) by the inhabitants of Each Streete where the said Wells shall bee made, Viz: one in the streete called over against Rowliff Johnsons the butcher another in the broad way against Mr. Vandickes another in the streete Called the ouer against Derrick Smiths another in the streete Called the over against the howse of John Cavillere, another in the yeard of backside or Cytie hall another in the streete called the over against Cornelius Van Borsums and that the severall Inhabitants take Notice of this Order and putt the same in Execucon with all Possible speede as they will answere the Contrary att their Wills"[1]

On September 10, 1686 the Common Council ordered nine more wells to be built. These were built of stone, "one halfe of the Charge of them to be borne by the inhabitants of every Streete proportionately and the other halfe by the Citty". One or two citizens were appointed to have charge of each well. The practice of dividing the expense between the beneficiaries and the city was continued as long as the public well system existed and is the forerunner of our present day assessment system.

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[2] See "The Catskill Aqueduct and Earlier Water Supplies of the City of New York" by Edward Hagaman Hall, published in 1917, from which work much of the narrative material herein contained has been taken.

[1] Minutes of the Common Council of the City of New York, 1675-1776, Vol. 1, p. 46. The blanks are found in the original records.

Some of the wells at the end of the Seventeenth Century became well known by name and their locations have been pretty well identified. Among them were the following:

Name	*Location*
De Riemer's Well	Whitehall Street, near Bridge.
William Cox's Well	Near Stadt Huys, at head of Coenties Slip.
Ten Eyck and Vincent's Well	Broad Street between Stone and South Willian Streets.
Tunis de Kay's Well	Broad Street, north of Beaver.
Frederick Wessel's Well	Wall Street, west of William Street.
Rombout's Well	Broadway, near Exchange Place Street.
Suert Olphert's Well	Near last mentioned.

Pumps came into fashion in the first half of the Eighteenth Century and rapidly displaced the old well-sweeps. After the city had bought its first fire engines, around 1740, it became even more necessary to maintain the water supply and in November, 1741, the Assembly enacted Chapter 719 entitled "An Act for mending and keeping in repair the publick wells and pumps of the City of New York." This law provided for the appointment of Overseers of Wells and Pumps, the levying of taxes for their maintenance, etc. Some times a public spirited citizen would give a well and pump to the city if the corporation would agree to keep it in repair. Henry Rutgers made such an offer to give a well and pump in the Out ward in December, 1785.

But generally the expense of the well and pump was jointly borne by the city and the neighborhood.[1]

On April 5, 1785, William Smith contracted to keep the wells and pumps in repair at the rate of £140 per annum; but Smith's job was not a profitable one; the number of pumps and wells was rapidly increasing and the cost of repair mounted with equal pace. The Common Council, therefore, devised the system of electing two Overseers of pumps and wells for each ward. But evidently these new functionaries occasionally neglected their duties, for on September 16, 1789, the Common Council "ordered that whenever the overseers of the Public Wells and Pumps neglect and refuse to do their duty that the Aldn & Assist of the Ward direct the necessary Repairs; lest by the want of water from the public wells and pumps the City may be endangered in case of fire."

During the year 1789, the Common Council approved bills for repairs to wells and pumps amounting to over £408.

The earliest proposal to supply the city from a common public reservoir with water conducted underground through pipes was made to the Common Council by the engineer Christopher Colles in 1774. On

[1] Minutes of the Common Council of the City of New York, 1675-1776, Vol. 5, pp. 164, 219, 223, 234, 240.
On August 26, 1784, for instance, the inhabitants of Frankfort Street petitioned for a well and pump and it was granted. The city's share of the first cost of this well and pump was £39:16:15. The cost of digging a well varied according to circumstances. In October, 1784, Silvanus Seely was paid £4:11:3 for digging a well in the South ward, but Phil Arcularius was paid £40:19:6 for digging one in Frankfort Street in 1785. On November 11, 1784, the Common Council authorized a well in Catharine Street and voted to contribute £7 toward it, later adding £8 more. In July, 1785, the inhabitants of Greenwich Street were given permission to sink two wells at their own expense, the corporation furnishing the pumps. In a similar way in August, 1785, the inhabitants of Chambers Street were permitted to make a well and stone it at their expense, the pump being at the expense of the corporation.

April 22, 1774 Colles proposed to erect a reservoir near the Collect or Fresh Water pond where he had reason to believe that the city would be able to maintain an adequate supply of fresh water, and he proposed that the city should distribute it through the streets by means of pipes made by boring a hole longitudinally through the trunks of small trees. The water was to be pumped into a reservoir from a well by a steam engine and to flow by gravity through the pipes.

When the proposition first came to the Common Council there was uncertainty as to its practicability and advisability. The Council therefore put the subject off and deliberated on it for three months.[1] When it came up for action on July 21, opinion was still divided; but the majority were in favor of the experiment and voted 8 to 2 to undertake it.[2] At the same time they voted to issue notes to the amount of £2600 for the undertakings. Subsequent issues brought the amount up to £9100.[3]

When Augustus and Frederick Van Cortlandt offered to sell the city a site for the reservoir on the east side of Great George Street, now Broadway, between Pearl and White Streets, at the rate of £600 an acre, the members of the Common Council personally went to the new well sunk on the property and tasted the water. Thus, we find in the Minutes of the Common Council of the City of New York, 1675-1776, Vol. 8 at page 47, the following:

"This Board having this day tried the Water of the New Well sunk in the Ground of Augustus

[1] Minutes of the Common Council of the City of New York, 1675-1776, Vol. 8, p. 26.
[2] Id.
[3] Id.

> and Frederick Van Cortlandt, and judging the same to be of a very good quality agreed in their formal Resolution of carrying the proposal of Christopher Colles into Execution and also of Issuing Notes to the Value of £2500, the Form of which said Notes was also agreed to be as follows to wit: * * *''

On August 29, 1774, the Common Council appointed a committee of eight members to superintend the construction of the project,[4] and in November they contracted for the furnishing of 60,000 linear feet of pitch or yellow pine timber for the making of the pipes.[5]

During 1775 the city went diligently ahead with the construction of the well, reservoir and pump house on a slight eminence on the west side of Broadway between Pearl and White Streets. But while the water works were being built the city was thrown into a turmoil of excitement by the news from Lexington and Bunker Hill. The work of construction, however, continued until 1776, but with the critical events of that year the project was completely interrupted, never to be renewed. During the period of the war the construction work was totally ruined.

The first pipeline system of water works was that of the Manhattan Company, which was incorporated in 1799. It is a well known historical fact that the banking privilege contained in the charter of the Manhattan Company was really the main objective of Aaron Burr and his fellow organizers of this company, and that the ostensible purpose of constructing water works was put in the charter merely as a means of covertly avoid-

[4] Id.
[5] Id.

ing the opposition which Burr was certain to encounter from the Federalist party and from Hamilton, who had organized the Bank of New York in 1784.

The fact remains, however, that the company did go ahead with its subordinate purpose of constructing a water works system, built reservoirs and laid a system of distributing pipes in the then small city.

During the first quarter of the Nineteenth Century there was bitter discontent with the inefficiency and unsatisfactory character of the supply of water by the Manhattan Company and there was constant agitation for the restoration of the public municipal water system. Thus, in 1831 the Board of Aldermen of the City adopted a resolution on March 3rd of that year which reads in part as follows:

> "Resolved, that the counsel of the Board, prepare a Memorial to the legislature, setting forth the wants of the city, in relation to a full and ample supply of water * * *; and further setting forth, that the Manhattan Company * * * have not, in the opinion of the Common Council, complied with the conditions of their charter; * * * And that there exists powers in the acts relating to this company, authorizing them to take, by process of law, all streams of water, and to divert water courses from their natural channels; and also in like manner to possess themselves of other property; which powers the Manhattan Company have wholly failed to use, therefore, asking a repeal of the said powers, now vested in said company, and the vesting exclusively of such powers, for the purpose aforesaid, in the corporation of the City of New York."

The service of the Manhattan Company and the quality of their water and their failure to further prosecute

the work of supplying the city with water were condemned in a report made on November 10, 1832 by Col. DeWitt Clinton to the Committee on Fire and Water of the Board of Aldermen (Document No. 61, November 10, 1832). Col. Clinton had been commissioned to report on the present state of the city's water supply and probable additional sources for further supply. In this same report Col. Clinton stated that the municipal water works was a splendid example of a properly operated water supply but that it would soon prove inadequate.[1] Col. Clinton further pointed out that at this time the only supply in the city were the municipal works on 13th Street and those owned by the Manhattan Company.

The Manhattan Company, however, met only a portion of the city's water needs and after the construction of the old Croton system in 1834, it ceased to supply any at all. With its demise the original New York City entered upon an uninterrupted course of municipal operation. Every other private company which had been chartered by the legislature to supply the city with water namely, the Sharon Canal Company, the New York Water Works, the New York Well Company and the New York & Harlem Spring Water Company failed to do so, their charters either having been voluntarily abandoned or having expired by non-user.[2]

The municipal water works just referred to had been constructed in 1829 and consisted of a reservoir in the

[1] Report of the Committee on Fire and Water, by Col. De Witt Clinton, Board of Alderman document No. 61, November 10, 1832, pp. 194, 195.

[2] Report of the Committee on Fire and Water, by Col. De Witt Clinton, Board of Alderman document No. 61, November 10, 1832, pp. 197, 198, 210.

small block between Broadway, Fourth Avenue, 13th and 14th Streets, for the distribution of water for fire extinguishing purposes.

In 1883 the first legislation was enacted wherein commissioners were appointed under legislative enactment to proceed with plans for providing the city with pure and wholesome water (Chap. 36 of the Laws of 1833, entitled "An Act of the Appointment of Commissioners in Relation to Supplying the City of New York with Pure and Wholesome Water"). The Croton water shed was then chosen as the source of supply. The first Croton Aqueduct was constructed, under the provisions of Chapter 256 of the Laws of 1834 and its amendments and supplementary legislation.

The first water supply commission and its successors, the Croton Aqueduct Board, the Department of Public Works and the Aqueduct Commissioners completed the construction of the old and new Croton Aqueducts and all the reservoirs within the Croton water shed.

As early as 1897 and before the Aqueduct Commissioners had completed their work it was realized that an additional water supply was of vital consequence. After much agitation there were enacted in 1905, six statutes relating to the water supply of the City. The principal and most important one of the six was Chapter 724. This law created the Board of Water Supply charged with the specific duty of providing an additional supply of pure and wholesome water for the City of New York. Under this law the present Catskill water supply system with a dependable draft of 600 million gallons has been constructed. The water for this sys-

tem is drawn from the Ashokan Reservoir on the Esopus water shed and from the Schoharie Reservoir on the Schoharie water shed, both being located in the Catskill Mountain area. The Catskill Aqueduct, 92 miles in length, conveys the water to the city and a city tunnel 18 miles long and a number of pipe conduits serve to distribute the water to the five boroughs of the city.

The necessity for an additional supply of water is presently engaging the attention of the city officials. It encompasses an additional supply of water from the drainage areas tributary to the Rondout Creek and the Delaware River. This is the system involved in *New Jersey v. New York,* 283 U. S. 336 (1931). The problem of its financing is presently of grave public debate and concern.

The Governor of the State of New York has, in his special message to the legislature, of February 20, 1936, urged that action must be taken immediately to avert the dangers of a water shortage to the City of New York. The Governor's message (quoted from the New York Times of February 21, 1936) reads in part as follows:

> "If the ground water resources of Kings and Queens are to be preserved and if the water supply resources of the eastern counties are not to be damaged seriously, prompt action may be necessary.
>
> "One evident cure is curtailment of pumping to safe limits and perhaps complete stoppage of the permanent extraction of ground water in Kings. Only thus can the water table be restored to a safe level.
>
> "If New York City now had the Delaware-Rondout water available, the problem would be simpli-

fied. The State Water Power and Control Commission advises me that an early start on the construction of that project is advisable for the well-being of the people of the city and to prevent damage to the water supply interests of the people of Nassau and Suffolk Counties.

"Legislation, much of it of a new and unusual type, is indicated. Such legislation, to be effective, must be based upon reasonably accurate information and upon public understanding of the problem. A considerable body of the required data has already been collected by the United States Geological Survey and by various state and local agencies but this information has not been put in useful shape and has not been published.

"I recommend that the legislature direct the Water Power and Control Commission to make a comprehensive study and report on this entire subject, containing statements as to existing conditions, present and future water supply needs and possible measures of conservation control and development. Such a report should then be published, widely circulated and used as the basis for remedial legislation.

"Time is a vital element. Adverse conditions have arisen because industrial wells are uncontrolled and because it is the duty of no person or authority to regulate withdrawals of water. Their aggravation has been in no wise checked. Further delay may result in the permanent diminution of the valuable water supply resources underlying large areas of Long Island.

"I strongly urge that your honorable bodies attack this problem during this season."

In its brief below, Government counsel urged that we must "turn to things at the time the Constitution was framed." By that test it is evident the City of New York water supply was a governmental function antedating the Constitution and has continued as such.

Application of Law to the Facts:

More than twenty-five percent of the water is used by the city for its own buildings, for sewage, street cleaning and fire protection (R. 28, fol. 84). It is obvious that these cannot be segregated and that the tests laid down by the Circuit Court of Appeals, that "private capital" may be able to supply the needs; or that "continuous exercise" of the function does not give it immunity, are wholly inapplicable to the situation herein presented (R. 46, 48).

Reality, and not metaphysics, determines the character of governmental functions and their consequent immunity:

> "Just what instrumentalities of either a state or the Federal Government are exempt from taxation by the other cannot be stated in terms of universal application."
>
> *Metcalf & Eddy v. Mitchell,* 269 U. S. 514, 522.
>
> "there is a real need for New York City taking immediate steps to increase its water supply." (Master's Report p. 201—in *New Jersey v. New* York, 283 U. S. 336.)

The size of the undertaking and its historic exercise by the City are matters of concern and will warrant distinguishing this from other possible cases and functions. Size was not regarded by the government in its brief below as a factor (pp. 9-10). Yet it has been so recognized by this Court in other circumstances.

Brown Holding Co. v. Feldman, 256 U. S. 170.
Levy Leasing Co. v. Diegel, 258 U. S. 242/245.

The cost to the City of New York has already been over $500,000,000 (R. p. 23) and will cost over a quar-

ter billion dollars more (Governor Lehman—*Message to Legislature, Feb. 20, 1936).* That this cannot be left to the caprice or avarice of private capital is evident and has been recognized by this Court:

> "No higher police duty rests upon municipal authority than that of furnishing an ample supply of pure and wholesome water for public and domestic uses."
>
> *Columbus v. Mercantile Trust Co.*, 218 U. S. 645/658.
>
> *Montana Water Co. v. Billings*, 214 Fed. 121/125.

The Inconsistency of the Bureau of Internal Revenue:

The truth of this litigation must be candidly faced. This suit is an instance of no attempt by a state to effect any insidious withdrawal of sources of federal revenue. *It is, rather, an evidence of a new drive directed at state governmental agencies throughout the country to obtain new sources of revenues for the federal treasury at the expense of the states.* Until this action the employees of the City of New York Water Supply Department never reported their salaries as taxable and were never questioned in their right to such tax immunity as employees of the City. For over one hundred and fifty years the water supply of New York City has been primarily a governmental undertaking, and never provided a cent of federal tax revenues. In fact, had not the cities and states engaged in the vital expansion of governmental functions necessary to the needs of an advancing civilization; had not states and cities taken, to use appellee's own words in brief below, "an active part in promoting and developing their own resources in assisting and aiding their citizens commensurate with public

welfare and higher standards of living and in creating organizations to carry on such purposes", federal revenues themselves from a multitude of other sources might well remain but a small trickle.

We but mention the danger envisaged of a veritable tax war between State and Federal governments, inevitable if this view of the Government and of the Circuit Court of Appeals be upheld. Such a result, opening up such federal activities as the post-office, parcels-post, federal reserve banks and the like, to State taxation (because in their initial character susceptible of private enterprise), would result in a sacrifice of the entire system of American dual constitutional government.

The argument that the services of water supply could still be performed by private capital, stressed by the opinion below, leads to the impasse suggested (R. 46, fol. 137). This test does not determine the nature of the function, whether usually or essentially governmental, or not. Carrying the mails, conduct of schools, coining of money, maintenance of standing armies, police protection, fire protection—all these and many more were at some time or other conducted by private capital and some still are, and might again be so operated. And in like manner many of the activities of the Federal government would be taxable by the States under the reasoning of the opinion below that the test is whether "when undertaken", no matter when or how necessary, is the function assumed by the government (R. 48, fol. 144). Such, we submit, is not the test applied in *Helvering v. Powers,* nor the true test of what is, under the circumstances here disclosed, properly

and normally a governmental function of the City of New York.

No attempt was made by the government below, and none is observed herein, to distinguish between employees and obligations of the particular state or municipal function, at least, insofar as taxation is concerned. *It is the character of the function that is the burden of the government's argument in favor of its right to tax petitioner's salary.* Yet in precisely a like situation, the Bureau of Internal Revenue has ruled that the income from bonds issued to finance a water and power supply to a city is not taxable. This despite the fact that the said bonds are solely payable out of the revenues derived from the operation of the power and light system.

In a letter to the General Counsel of the Reconstruction Finance Corporation under date of Dec. 20th, 1935, the Commissioner of Internal Revenue wrote:

"Mr. James B. Alley,
General Counsel,
Reconstruction Finance Corporation,
Washington, D. C.

In re: Los Angeles
Department of Water and Power

Sir:

Reference is made to your letter of November 30, 1935, submitting an inquiry whether interest on refunding bonds issued by the Department of Water and Power of the City of Los Angeles, California, will be exempt from Federal income taxes.

"These bonds, identified as Electric Plant Revenue Bonds, Refunding Issue, 1935, have

been, it is stated, authorized by the Department of Water and Power for the purpose of refunding an indebtedness of $22,799,000 represented by short-term negotiable notes held by the Reconstruction Finance Corporation.

"It is represented that the bonds are to be issued in the name of the Department of Water and Power and are to be payable solely from the income and revenues derived from the operations of the light and power system.

"It is held that the interest on these bonds will not be subject to income tax under the Revenue Act of 1934.

Respectfully,

(signed) GUY T. HELVERING,
Commissioner."

It is impossible to reconcile the above with the attitude taken in the instant proceeding. The answer is to be found only in an insensate scramble for any kind of revenues in the hope that the victims will not seek the haven of the courts. The States have too great a principle at stake to permit such a tax program to go unchallenged.

II.

The Federal taxation of New York City's water supply will constitute a direct burden on the State of New York.

The City of New York has more than half the population of New York State. The revenues of its water supply department are turned over to the General Tax Fund of the City and from its general revenues and budget the salary of petitioner and other employees of the department are paid. In the year 1931,

for which the tax here in question was levied, the City spent more than it received from water revenues. In 1932 a deficit of more than $4,000,000 resulted and for 1933 of about $7,000,000 (R. 33). These are similar to deficits commented upon in *Commissioner v. Ten Eyck*, 76 Fed. (2nd) 515, from which case also the Government did *not* appeal to this Court.

But more than that, the State of New York has invested in the bonds of water supply districts including those of New York City, the treasury funds of the State itself. Any inroads upon the immunity of the City of New York in respect of said function will result in a corresponding burden upon the State and will affect directly the value of those investments. Here is a property interest of the State that is more than academic. The implications of the attempt to tax state and municipal agencies and their employees are too evident to need further discussion herein. Reference is made to the facts set forth in the petition *(supra)* for the seriousness of the issue.

III.

If the water supply function is immune, the salaries of the city's officers and employees engaged therein are likewise immune.

This would follow logically as a result of the foregoing argument. But this Court has expressly so held in one of its most recent decisions.

In *People ex rel. Rogers vs. Graves et al.* No. 139, decided January 4, 1937, Mr. Justice Sutherland writing for the unanimous Court said:

"The railroad company being immune from taxation, it necessarily results that fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune."

(N. Y. Times, Report of Opinion, Jan. 5, 1937).

IV.

The determination of the Circuit Court of Appeals, Second Circuit, and of the Board of Tax Appeals herein should be reversed and the salary of petitioner declared immune from Federal income tax.

All of which is respectfully submitted by

JOHN J. BENNETT, JR.,
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HENRY EPSTEIN,
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Supreme Court of the United States

OCTOBER TERM 1936.

No. 451

WILLIAM WHITLOCK BRUSH,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

MOTION ON BEHALF OF THADDEUS MERRIMAN AND HERMAN GOLDBERG FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF AS AMICUS CURIAE.

J. JOSEPH LILLY,
Counsel for Thaddeus Merriman and
Herman Goldberg, Amicus Curiae.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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